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Case No. CV 17-2534 BRO(JC)

ORDER (1) CONSTRUING  
PETITION AS 28 U.S.C.  
§ 2255 MOTION; AND  
(2) DISMISSING ACTION  
WITHOUT PREJUDICE

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## 1    **II.    BACKGROUND<sup>1</sup>**

2            On April 6, 2011, a Superseding Indictment was filed in the Hawaii  
3 Criminal Case, charging petitioner with conspiracy to distribute and to possess  
4 with intent to distribute fifty grams or more of methamphetamine (count 1) and  
5 possession with intent to distribute fifty grams or more of methamphetamine  
6 (count 2). On June 15, 2011, a Memorandum of Plea Agreement (“Plea  
7 Agreement”) signed by petitioner, his counsel, and government counsel, was filed  
8 in the Hawaii Criminal Case. Petitioner agreed to plead guilty to count 1, and the  
9 government agreed to dismiss count 2. Notwithstanding the foregoing, the Plea  
10 Agreement reflects petitioner’s agreement and understanding that (1) the conduct  
11 forming the basis for count 2 would also be used in calculating petitioner’s base  
12 offense level under the United States Sentencing Guidelines; and (2) the  
13 prosecution would apprise the Court and the United States Probation Office of the  
14 nature, scope and extent of petitioner’s conduct regarding the charges against him,  
15 any related matters, and any matters in aggravation or mitigation relevant to the  
16 issues involved in sentencing. On June 15, 2011, petitioner pleaded guilty to count  
17 1 in accordance with the Plea Agreement.

18            On May 17, 2012, the Hawaii District Court sentenced petitioner to 235  
19 months imprisonment after determining that his total offense level was 35 (base  
20 offense level of 38, plus four for his role in the offense, minus three for his  
21 acceptance of responsibility, and minus four for cooperation), he was in criminal  
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23            <sup>1</sup>Unless otherwise indicated, the facts in this section are derived from court records in  
24 Hawaii District Court Case Nos. 1:10-cr-00923-LEK-1 (“Hawaii Criminal Case”) and 1:15-cv-  
25 00343-LEK-KSC (“Hawaii 2255 Case”) and the United States Court of Appeals for the Ninth  
26 Circuit (“Ninth Circuit”) in Case Nos. 16-10248 (“First Ninth Circuit Action”), 16-10299  
27 (“Second Ninth Circuit Action”), 16-15390 (“Third Ninth Circuit Action”), 16-73432 (“Fourth  
28 Ninth Circuit Action”), 17-15270 (“Fifth Ninth Circuit Action”), and 17-70636 (“Sixth Ninth  
Circuit Action”), of which this Court takes judicial notice. See Fed. R. Evid. 201; Harris v.  
County of Orange, 682 F.3d 1126, 1131-32 (9th Cir. 2012) (court may take judicial notice of  
court records).

1 history category IV, and his guideline range was 235 to 293 months imprisonment.  
2 Judgment was entered accordingly on May 22, 2012 (“Criminal Judgment”). In  
3 2016, petitioner appealed the Criminal Judgment – specifically his sentence – in  
4 the First Ninth Circuit Action (No. 16-10248) and the Second Ninth Circuit Action  
5 (No. 16-10299). The Ninth Circuit granted petitioner’s motion to dismiss the First  
6 Ninth Circuit Action and dismissed it on June 23, 2016.<sup>2</sup> The Ninth Circuit  
7 dismissed the Second Ninth Circuit Action as untimely on October 19, 2016.<sup>3</sup>

8 On April 14, 2015, following Amendment 782 to the United States  
9 Sentencing Guidelines, the Hawaii District Court issued an Order Regarding  
10 Motion for Sentence Reduction pursuant to 18 U.S.C. § 3582(c)(2), reducing  
11 petitioner’s sentence to 191 months. Such order was entered on April 15, 2015.  
12 Petitioner thereafter appealed such order to the Ninth Circuit in the Third Ninth  
13 Circuit Action (No. 16-15390). The Ninth Circuit granted petitioner’s motion to  
14 dismiss the Third Ninth Circuit Action and dismissed it on August 11, 2016.<sup>4</sup>

15 On August 24, 2015, petitioner submitted a Motion under 28 U.S.C. § 2255  
16 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (“Hawaii  
17 2255 Motion”), challenging the Criminal Judgment, which was filed in both the  
18 Hawaii Criminal Case and the Hawaii 2255 Case. Petitioner claimed that his  
19 counsel was ineffective at sentencing, that the trial court incorrectly determined his  
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21 <sup>2</sup>On November 7, 2016, petitioner filed a motion to reconsider such dismissal. The Ninth  
22 Circuit has not ruled on such motion.

23 <sup>3</sup>On November 7, 2016, petitioner filed a motion to reconsider such dismissal. The Ninth  
24 Circuit denied such motion on January 31, 2017, indicating that no further filings would be  
25 entertained in the closed Second Ninth Circuit Action.

26 <sup>4</sup>Petitioner twice moved to reinstate his appeal in the Third Ninth Circuit Action on  
27 August 23, 2016 and September 23, 2016. The Ninth Circuit denied the first such motion on  
28 September 13, 2016, indicating that no further filings would be entertained in the closed Third  
Ninth Circuit Action. The Ninth Circuit has not ruled on the subsequently filed second such  
motion.

1 criminal history category, and that his offense level was improperly enhanced  
2 based upon his role in the offense. On January 26, 2016, in an order filed in both  
3 the Hawaii Criminal Case and the Hawaii 2255 Case, the Hawaii District Court  
4 denied the Hawaii 2255 Motion as untimely (“Hawaii 2255 Order”).

5 On March 7, 2016, petitioner filed a Motion for Reconsideration in the  
6 Hawaii Criminal Case (“First Motion for Reconsideration”), seeking  
7 reconsideration of the Hawaii 2255 Order. On May 9, 2016 and again on May 17,  
8 2016, the Hawaii District Court denied the First Motion for Reconsideration.

9 On October 11, 2016, petitioner filed a Motion to Correct Sentence in the  
10 Hawaii Criminal Case (“First Motion to Correct Sentence”). Petitioner again  
11 challenged the Criminal Judgment, repeated many of his prior assertions, and also  
12 asserted, among other things, that the government had breached the Plea  
13 Agreement in connection with the sentencing. On October 25, 2016, the Hawaii  
14 District Court construed the First Motion to Correct Sentence as a “motion for  
15 certification of a second or successive § 2255 Motion” and directed that it be  
16 transmitted to the Ninth Circuit for consideration (“First Transmittal Order”). The  
17 First Transmittal Order effectively initiated the Fourth Ninth Circuit Action (No.  
18 16-73432).

19 On January 23, 2017, petitioner filed another Motion for Reconsideration in  
20 the Hawaii Criminal Case (“Second Motion for Reconsideration”), seeking, among  
21 other things, reconsideration of the First Transmittal Order. On January 31, 2017,  
22 the Hawaii District Court denied the Second Motion for Reconsideration.

23 On February 27, 2017, petitioner filed another Motion to Correct Sentence in  
24 the Hawaii Criminal Case (“Second Motion to Correct Sentence”), essentially  
25 reasserting his prior claims – ineffective assistance of counsel at sentencing, trial  
26 court error in calculating his criminal history, trial court error in enhancing his  
27 sentence based upon his role in the offense, and government breach of the plea  
28 agreement in connection with sentencing. On March 2, 2017, the Hawaii District

1 Court denied a portion of the Second Motion to Correct Sentence, construed the  
2 remaining portion to be a “motion for certification of a second or successive  
3 § 2255 Motion,” and directed that it be transmitted to the Ninth Circuit for  
4 consideration (“Second Transmittal Order”). The Second Transmittal Order  
5 effectively initiated the Sixth Ninth Circuit Action (No. 17-70636).

6 On March 13, 2017, the Ninth Circuit issued orders denying petitioner leave  
7 to file a second or successive Section 2255 motion in both the Fourth and Sixth  
8 Ninth Circuit Actions.

9 On April 14, 2017, in the Fifth Ninth Circuit Action (No. 17-15270), the  
10 Ninth Circuit denied petitioner’s request for a certificate of appealability to appeal  
11 the Hawaii 2255 Order.

12 As noted above, on April 3, 2017, petitioner filed the instant Petition, again  
13 challenging the Criminal Judgment – the sentence – in the Hawaii Criminal Case.

### 14 **III. DISCUSSION**

15 A federal inmate’s petition to challenge the legality of his conviction and  
16 sentence must generally be filed under Section 2255 in the district in which he was  
17 convicted and sentenced, whereas a petition to challenge the manner, location, or  
18 conditions of the execution of the sentence must be brought under 28 U.S.C.  
19 § 2241 (“Section 2241”) in the custodial district. See Hernandez v. Campbell, 204  
20 F.3d 861, 864-65 (9th Cir. 2000) (per curiam). A federal prisoner may file a  
21 habeas corpus petition pursuant to Section 2241 to contest the legality of his  
22 conviction or sentence only where his remedy under Section 2255 is “inadequate or  
23 ineffective to test the legality of his detention.” Marrero v. Ives, 682 F.3d 1190,  
24 1192 (9th Cir. 2012) (citing and quoting Stephens v. Herrera, 464 F.3d 895, 897  
25 (9th Cir. 2006), cert. denied, 549 U.S. 1313 (2007)), cert. denied, 133 S. Ct. 1264  
26 (2013). The “inadequate or ineffective” exception is narrow. Ivy v. Pontesso, 328  
27 F.3d 1057, 1059 (9th Cir.) (as amended) (citation omitted), cert. denied, 540 U.S.  
28 1051 (2003). Section 2255’s remedy is not “inadequate or ineffective” merely

1 because Section 2255's gatekeeping provisions prevent the petitioner from filing a  
2 second or successive petition. Id. (citation omitted); Lorentsen v. Hood, 223 F.3d  
3 950, 953 (9th Cir. 2000); Moore v. Reno, 185 F.3d 1054, 1055 (9th Cir. 1999),  
4 cert. denied, 528 U.S. 1178 (2000).

5 The present Petition falls squarely within the purview of Section 2255  
6 because petitioner seeks to challenge the validity of his sentence. See Porter v.  
7 Adams, 244 F.3d 1006, 1007 (9th Cir. 2001) ("Merely labeling a section 2255  
8 motion as a section 2241 petition does not overcome the bar against successive  
9 2255 motions."). Accordingly, it does not fall within this Court's Section 2241  
10 jurisdiction unless petitioner can meet the criteria of the "savings clause," *i.e.*,  
11 unless he can show that a Section 2255 motion is inadequate or ineffective to test  
12 the legality of his detention.

13 Nothing in the record reflects that a Section 2255 motion is an inadequate or  
14 ineffective remedy and petitioner has not so demonstrated. See Jackson v. Slade,  
15 2004 WL 1083351 \*2 (C.D. Cal.) (Matz, J.) (burden of coming forward with  
16 evidence to show inadequacy or ineffectiveness of motion under section 2255 rests  
17 squarely on petitioner) (citing Jeffers v. Chandler, 253 F.3d 827, 830 (5th Cir.),  
18 cert. denied, 534 U.S. 1001 (2001)). Although Section 2255's gatekeeping  
19 provisions have apparently prevented petitioner from obtaining a review of the  
20 merits of his claims, such fact, as explained above, does not render Section 2255's  
21 remedy "inadequate or ineffective" so as to permit consideration of his claims  
22 under Section 2241. Accordingly, the Court construes the Petition to be a Section  
23 2255 motion.

24 This Court does not have jurisdiction to consider such a Section 2255  
25 motion because petitioner was not convicted or sentenced in this district.  
26 Accordingly, the present application must be either dismissed or transferred to the  
27 Hawaii District Court where petitioner was convicted and sentenced. As noted  
28 above, petitioner has already filed a Section 2255 motion in the Hawaii District

1 challenging the same Criminal Judgment/sentence. The present Petition/  
2 Section 2255 motion, is thus successive, and cannot be entertained by the Hawaii  
3 District Court unless and until authorized by the Ninth Circuit. As also noted  
4 above, the Ninth Circuit – which has already had an opportunity to consider  
5 whether petitioner should be granted leave to file a second or successive petition  
6 asserting essentially the same claims raised in the federal Petition/2255 motion  
7 filed in the instant action – has already twice denied petitioner leave to do so. It  
8 would thus be futile to transfer this action to the Hawaii District Court for  
9 consideration as a Section 2255 motion. Therefore, the present Petition should be  
10 dismissed without prejudice, for lack of jurisdiction. Petitioner's remedy is to  
11 again apply to the Ninth Circuit for leave to file a successive Section 2255 motion.

12 **IV. ORDERS**

13 IT IS THEREFORE ORDERED:

- 14 1. The Petition is construed as a motion arising under Section 2255.
- 15 2. The Petition/Section 2255 Motion is dismissed without prejudice for  
16 lack of jurisdiction.
- 17 3. The Clerk is directed to enter Judgment accordingly.

18 IT IS SO ORDERED.

19 DATED: April 20, 2017

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22 HONORABLE BEVERLY REID O'CONNELL  
23 UNITED STATES DISTRICT JUDGE  
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